In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1123

MCEWEN MANUFACTURING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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1. In May 1966, the Amalgamated Clothing Workers of America, AFL-CIO, commenced an organizational drive among the Company's employees. By May 28, it had obtained authorization cards from 109 of the 172 employees in the bargaining unit (Pet. App. 13a; R. 71-73).[1] The Company refused the

[1] "R." references are to the printed Appendix to the parties' briefs in the court below. "S.R." references are to the printed supplemental appendix filed below.

Union's request for recognition based on an examination of the authorization cards by a mutually agreeable third party and, on June 15, filed with the Board's Regional Office a petition for a representation election among its employees (Pet. App. 32a, 51a, n. 19; S.R. 90). On July 27, the Board conducted an election among the Company's employees, which the Union lost. The Union filed objections and, on September 2, the Regional Director recommended that the election be set aside and a new election be directed (Pet. App. 32a, 68a-74a). On November 18, the Board affirmed the action of the Regional Director (Pet. App. 64a-67a).

2. In the interim, the Union had filed unfair labor practice charges alleging that the Company had restrained and coerced employees and had unlawfully refused to bargain with the Union; the Board's General Counsel issued a complaint based on these charges (Pet. App. 32a-34a). After the hearing the Board found that the Company had violated Section 8(a)(1) of the Act by the threats contained in a letter and speech by its President on July 14 and 26, respectively,[2] and by the "extensive and widespread acts of interrogation and intimidation" engaged in by its supervisors (Pet. App. 10a-12a, 47a-49a). The Board also found that the Union had held valid authorization cards from a majority of employees in the appropriate unit on May 28, 1966 (when the Union made its demand for recognition), that the Company had refused to recognize the Union in order to gain time in

[2] This letter and speech were the basis for setting aside the election (Pet. App. 70a-71a).

which to dissipate the Union's majority, and that the Company thus violated Section 8(a)(5) of the Act (Pet. App. 13a, 26a, 31a).

The Board ordered the Company to cease and desist from the unfair labor practices found and from otherwise restraining or coercing its employees in the exercise of their organizational rights, and further ordered it to bargain collectively with the Union upon request (Pet. App. 27a-30a). The Board found that a bargaining order was necessary to remedy the violation of Section 8(a)(5), and also because the Company's Section 8(a)(1) "conduct made impossible the holding of a fair election" (Pet. App. 31a). The court of appeals enforced the Board's order in full (Pet. App. 1a-6a).

3. Petitioner does not here challenge the Board's unfair labor practice findings, which were sustained by the court below. Rather, petitioner's basic contention is that, because the Board set aside the first election as a result of the Union's objections and directed a second election, it was thereafter precluded from relying on authorization cards to establish the Union's majority status and from entering a bargaining order based thereon (Pet. 19-22). However, when the Board decided to set aside the first election and direct a new one, a complaint had not as yet issued on the unfair labor practice charges which the Union had just filed. The only issue before the Board at that time was whether the President's letter and speech warranted setting that election aside; upon agreeing with the Regional Director that they did, the Board followed its normal practice in a representation proceeding—

setting aside the election and ordering that a new one be held "at such time as the Regional Director deems appropriate" (Pet. App. 66a). No choice-of-remedies issue was presented at this stage. The first occasion the Board had to focus on the fairness of holding a second election and the existence of alternative remedies arose during the unfair labor practice proceeding. That proceeding established both the full pattern of the Company's acts of restraint and coercion and the Union's prior success in obtaining valid authorization cards from a majority of the employees in an appropriate unit. In these circumstances, the Board was not estopped to conclude that a fair re-run election could not be held and that a bargaining order was the only effective remedy for the Company's unfair labor practices. The Board held in *Bernel Foam Products Co.*, 146 NLRB 1277, that a union does not waive its right to pursue unfair labor practice charges arising out of an organizational campaign by electing to proceed to an election in the face of conduct it considers objectionable; that decision was approved by this Court in *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575, 615, n. 34, and its application here—which is the essence of petitioner's challenge—raises no issue warranting further review.[3]

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[3] Similarly, the stipulation as to the payroll date for the election did not preclude a finding that the Union had a card majority on an earlier date. The former date is selected by the parties only for the purpose of determining which employees are entitled to vote in a scheduled Board election. The refusal to bargain issue is whether, on the date of the refusal, the Union possessed a majority of valid authorization cards.

4. Petitioner's final contention (Pet. 24-25), that the Board impermissibly modified its order without notice to the parties, is without merit. The Board's order was issued on July 3, 1968. On August 15, 1968, not 1969, while the case was pending on petition for review in the court below and long before this Court's decision in *Gissel*, the Board issued an errata sheet (Pet. App. 30a-31a) adding a paragraph explaining the Board's rationale which had been "inadvertently omitted." As the court below held: "The additional paragraph in no way altered the remedial order; it merely amplified the rationale behind the Board's decision and helped explain why the Board felt that an order to bargain would be necessary. The company was in no way prejudiced by the addition of this errata." (Pet. App. 3a, n. 5.)

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1970.

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